
The ZBA Decision Making Process

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Disclaimer

- Much of the material today is based upon experience, not statute or decided case law.
 - TTWWHADI:
 - “That’s the way we have always done it.”
 - That doesn’t mean it was the best way.
 - That doesn’t mean it was the only way.
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The Authority of Towns & Cities

- Municipalities get their authority from the state.
 - No Home Rule Authority. The Court has held:
 - “Towns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto.”
 - Girard v. Allenstown, 121 NH 268 (1981).
 - Each zoning ordinance must comply with the enabling act (RSA 674) in its adoption, regulations, and administration.
 - Jaffrey v. Heffernan, 104 NH 249 (1962)
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Independence of the ZBA

- Zoning Board of Adjustment may overturn decisions of Planning Board and/or Selectmen when adjudicating:
 - ❑ Administrative Appeals
 - ❑ Equitable Waivers of Dimension
 - ❑ Variances and Special Exceptions
 - ❑ Building on a Class VI road, per RSA 674:41
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Checks and Balances: Land Use

- Selectmen have an ex-officio member on the Planning Board, but must observe multiple membership limit of RSA 673:7
 - Selectmen may petition the ZBA for rehearing if disagree with decision
 - Only selectmen may appeal a land use board decision to court on behalf of the municipality
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Essence of Judicial Decision Making

- A process that provides “procedural due process”
 - An impartial tribunal
 - An open and transparent process in accordance with the “right to know” law
 - A record that permits meaningful judicial review upon appeal
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“Procedural Due Process”

- To protect against an unfair loss of a property right, the federal and state constitutions require minimum safeguards:
 - ❑ Notice to affected persons of a proposed action
 - ❑ An opportunity to be heard at a public hearing
 - ❑ Decision by an impartial tribunal
 - ❑ Ability to appear and speak through counsel
 - ❑ Deliberation based upon evidence and facts
 - ❑ A written decision with reasons

N.H. Statute & Due Process

- Notice to affected persons
 - RSA 676:7, I (a)
- Opportunity to be heard at a public hearing, to appear and speak through counsel;
 - RSA 676:7, I and III
- Decision by an impartial tribunal
 - RSA 673:14
- Deliberation based upon evidence and facts
 - RSA 674:33 and RSA 91-A
- A written decision with reasons;
 - RSA 676:3

The Board's Procedural Rules

- All land use boards are required to have rules of procedure by RSA 676:1.
 - No specific set of rules is mandated, no mention of “Robert’s Rules”.
 - Examples at OEP website and RPC websites.
 - Assists members in treating similar cases in similar ways.
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The Impartial Tribunal

Who will hear this case?

Adjudicative Decisions

- An act is “judicial” if:
 - ❑ Officials are bound to notify & hear the parties.
 - ❑ Decisions are based upon the evidence and arguments the parties choose to lay before them.
 - Appeal of the City of Keene, 141 NH 797 (1997).
 - An act is “legislative” if:
 - ❑ Deals with policy affecting all citizens.
 - ❑ The vote of a member does not determine the outcome.
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Judicial Decisions

- Typically, conflicts arise in six situations:
 - ❑ Prejudgment
 - ❑ Abutters
 - ❑ Financial interest in the outcome
 - ❑ Employment
 - ❑ Family relations
 - ❑ Other relations

Land Use Boards

- Under RSA 673:14, a member is prohibited from sitting on a case:
 - If that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.
 - Any board member can ask for a non-binding vote on whether he or she, or any other member, is disqualified in a case.
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Prejudgment

- Atherton v. Concord, 109 N.H. 164 (1968). The mere fact that the planning board member voted in favor of the project, did not disqualify him from voting on the same project as a member of the city council.
 - Winslow v. Holderness Planning Board, 125 N.H. 262 (1984). A member was disqualified where, prior to his position on the planning board, he had spoken in favor of a project at a public hearing on a subdivision application in his private capacity.
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Family Relations

- Webster v. Candia, 146 N.H. 430 (2001).
 - In an application before the planning board, there was no bias on the part of a board member when:
 - His spouse was leading proponent against project.
 - The member came to the board with a memorandum detailing the reasons to deny the application.
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What to Do?

- Local officials should reveal any conflict to the parties at the earliest possible time:
 - If nobody objects at that time, they may have waived their right to object later.
 - Fox v. Town of Greenland, 151 NH 600 (2004)
 - When in doubt, step down.
 - Consider a local conflict of interest ordinance or a board ethics policy.
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Who is sitting on this case?

- The 5 regular members shall sit unless disqualified, or absent.
 - An alternate member, selected by the Chairperson, may sit for each ***disqualified*** or ***absent*** member, RSA 673:11.
 - An alternate may not fill a seat that is ***vacant***, i.e.. death or resignation.
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Role of Alternate Members

- Somewhat controversial, see plan-link.
 - We advise that they not sit with the board during hearings, and not participate in deliberations. May ask questions, make observations, as would any other participant.
 - Others believe they should be with the board, and participate in all discussions, but not make motions, or cast a vote.
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Quorum of the Board

- The concurring vote of 3 members of the board needed to decide in favor of an applicant or petitioner. RSA 674:33, III.
 - Does an applicant have a due process right to be heard by a full board of 5?
 - Is a decision by less than 5 members a reason for a rehearing?
 - Does an appointing authority have a duty to fill vacancies to make a full board?
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Clues, but no definite answer

- ZBA member missed some hearings on complex case, and voted. Abutters failed to object before vote: Held: member not disqualified.
 - Fox v. Town of Greenland, 151 NH 600 (2004)
- PB member missed meetings and voted on subdivision. Held: Constitution does not require all members of a board to participate, nor is a participating member required to attend every hearing.
 - Auger v. Town of Strafford, August 23, 2007

Quorum

- The clues from Auger are:
 - Parties may not have a constitutional right to demand a full board for every decision, and
 - Lack of a full board probably does not justify rehearing.
 - However, this is a PB case.
 - The clue from Fox is:
 - Provide an opportunity to object to any member prior to a vote, and document the response.
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An Open and Transparent Process

The Right to Know Law
Evidence

The Right to Know Law

- Part I, Article 8 of the NH Constitution:
 - Government ... should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.
 - A MEETING of a PUBLIC BODY must have PROPER NOTICE and be OPEN TO THE PUBLIC. RSA 91-A:2.
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Notice, Open to the Public

■ Notice

- ❑ For “Right to Know” purposes, post 24 hours in advance, 2 public places, RSA 91-A; RSA 673:17.
- ❑ For parties, see RSA 676:7, 5 days certified mail

■ Open to the Public

- ❑ Open to anyone (not just residents)
 - ❑ May take notes, record, photograph, etc.
 - ❑ No requirement to post agenda, or to follow one
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Participation and Minutes

■ Participation in the hearing

- ❑ The right to be present (RSA 91-A) does not mean a right to speak, or add documents to the record.
- ❑ RSA 676:7, I(a): applicant and persons “directly affected” shall be heard, others at board discretion.

■ Minutes of Meetings

- ❑ Kept and made available within 5 business days (2007 change from 144 hours)
 - ❑ Include members present, people participating, summary of subject matter and decisions reached or action taken.
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Ex Parte Contacts

- Meaning: contact between an adjudicator and a party without other interested persons available to hear and participate.
 - Prohibited:
 - Exception; procedural questions
 - Rules of procedure reduce the questions
 - Use your staff, especially the clerk, to answer these questions.
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Why is this a big deal? Examples:

- An applicant finds abutters have lobbied members by phone or e-mail.
 - Abutters find that the applicant has discussed the case in detail with members prior to the hearing.
 - As a board member, you find that the applicant has asked for relief based upon advice received from the chairperson during a one-on-one meeting.
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Evidence Issues

- The burden of production and the burden of proof lies with the applicant.
 - Production: There must be evidence in the record to support a finding of fact on each element.
 - Proof: “preponderance of the evidence”
 - Formal “rules of evidence” for a court do not apply.
 - In the absence of evidence in the record, a decision is likely to be reversed on appeal.
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Who Can Ask Questions?

- Through the chair:
 - ❑ Members, seeking information needed to make a decision.
 - ❑ Parties, seeking to test assertions made by others, including experts.
 - ❑ Other persons, including alternates and experts, at the discretion of the board.
 - Not formal cross-examination.
 - ❑ Goal is to receive a clear presentation, not create traps for the unwary.
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Evidence, Who Do We Believe?

- A board may consider its own knowledge of an area, and is not bound to accept an expert's opinion.
 - Vannah v. Bedford, 111 NH 105 (1971)
 - However, a board cannot simply ignore “credible and uncontroverted evidence” from an expert.
 - Malachy Glen Associates v. Town of Chichester
3/20/2007
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Closing the Public Hearing and Moving to Deliberation

- When the chairperson closes the public hearing, the receipt of information is complete.
 - Don't ask questions of parties during deliberation.
 - Don't allow others to pose questions to the board
 - If the board chooses to reopen the hearing:
 - Be sure to allow all parties an opportunity to be heard on the additional information.
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What if we hold multiple hearings in an evening meeting?

- An issue for the Board itself under its procedural rules.
 - Not required to deliberate at the close of the public hearing.
 - May deliberate some or all cases at the end of the meeting.
 - May deliberate some or all cases on a different day.
 - May continue a hearing until a different day.
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Deliberations Must Be in Public-

The Right to Know Law

- If deliberating at a different time:
 - ❑ Observe the right to know law and deliberate to decision in public, RSA 673:17.
 - ❑ Do not allow ex-parte contact with board members in the interim days.
 - ❑ Members should not discuss the case between themselves in person, by phone, or by e-mail, unless it is to receive legal advice from counsel for the ZBA.
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Obtaining Legal Advice During Deliberations

- Consultation with counsel is not a “meeting”.
 - Need not be posted.
 - No minutes are required.
- What if the board meets to review a letter from counsel? Is this “consultation”?
 - Advice from counsel is privileged, not a public record subject to disclosure.
 - But, if the advice or letter is disclosed in public, the privilege may be waived.

“Taking a break” during deliberation

- An issue for the discretion of the board, but:
 - Watch out for ex-parte contacts with applicants or interested persons.
 - Don't allow members to discuss the case between themselves during the break.
 - Misconduct could allow someone to move to disqualify a member, and jeopardize the entire hearing.
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Motion Practice

Create clear results, not confusion

Motions & The Elements of a Variance or Special Exception

- Motions should be made in accordance with your rules of procedure.
 - We suggest that ZBA's do not take separate votes on each element of a request, but instead create a motion to grant or deny the entire request.
 - Why?, the 3 affirmative vote rule of RSA 674:33,III
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Example: Was This Variance Granted?

Member	Public Interest	Hardship	Spirit & Intent	Substantial Justice	Diminish Value	All 5 Elements
1	Y	N	Y	N	Y	N
2	Y	N	N	N	Y	N
3	Y	Y	N	Y	Y	N
4	N	Y	Y	Y	N	N
5	N	Y	Y	Y	N	N
# Members Favor this Element	3	3	3	3	3	0

Failed Motions?

- Issues for your rules of procedure:
 - ❑ Proceeding with an even number of members, effect of a tie vote? Does not pass the motion to approve, since there are not 3 affirmative.
 - ❑ Is a failed motion to approve a denial, or just an opportunity for a new motion?
 - ❑ Are members allowed to abstain, and does an abstention destroy a quorum?
 - ❑ Effect of a failed motion to deny?
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Drafting a Motion for Approval

- ZBA relief runs with the land, so take care and be precise.
 - Don't say: "Move to approve a 10 foot variance..."
 - Do say: "Move to grant a variance from section ____ to allow a side setback of 10 ft where 20 ft is required..."
- Not required to grant what the applicant seeks; craft the relief you feel is appropriate.

May we add conditions to the approval?

- Yes, provided that the conditions relate to the use of the land, and not to the person by whom the use is to be exercised.
 - If a person undertakes substantial construction or incurs substantial liabilities based upon a variance, the rights become vested.
 - Wentworth Hotel, Inc. v. Town of New Castle, 112 NH 21, (1972)
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The Conditions Cannot Delegate Duties to Others

- When considering a special exception, a ZBA approved the relief subject to off site improvements to be completed by the State. Held, this was the same as waiving or varying the terms of the zoning ordinance, and special exception unlawful.
 - Tidd v. Alton, 148 NH 424 (2002)
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Conditions Can Send the Applicant Back to Other Land Use Boards

- When a proposal requires both ZBA relief and Planning Board subdivision or site review approval:
 - Who hears the case first? Usually the ZBA, since without their relief, the proposal fails.
 - Whose conditions prevail? The ZBA usually defers most to the Planning Board.
 - These are the cases where joint meetings (RSA 676:2) are most helpful.
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Drafting a Motion for Denial

- Again, be careful and precise, to minimize the issues for a Motion for Rehearing.
- Utilize evidence to explain why the required elements are not present, such as:
 - The special exception should be denied because the proposal would create a serious traffic hazard.
- Create the motion to speak to the requested relief, not each of the elements of the relief.

A Meaningful Record for Review

Do we want to do this all over again?
Supreme Court cases

Findings of Fact

- Commentators, including OEP, suggest detailed findings of fact to aid in court review.
 - However, the absence of findings is not in and of itself error.
 - Thomas v. Town of Hooksett 153 NH 717 (2006)
 - Although, a Superior Court can send a case back if it finds the decision “unclear”.
 - Kalil v. Town of Dummer ZBA, April 19, 2007.
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The Written Notice of Decision

- Something in writing is required.
 - If a denial, the reasons must be specified.
 - RSA 676:3, I
 - The written decision is an opportunity
 - To communicate exactly what relief was granted, or why a request was denied.
 - To create a record for future local officials to use in understanding what relief was granted to an applicant.
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Challenges and Changes

In every contested case, someone will feel they have lost, and want to have the ZBA reconsider a decision.

It Isn't Over Until it is Over.

- Any decision is subject to request for rehearing for 30 days.
 - May be requested by any “person directly affected”, the selectmen or a member of the ZBA.
 - RSA 677:2
 - ZBA has inherent authority to reconsider for any reason during 30 day appeal period.
 - 74 Cox St., LLC v. City of Nashua, 9/21/2007.
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Procedures for Rehearing

- Board must act within 30 days of receipt of the motion.
 - No new notices to parties or abutters are required.
 - The Board must consider the Motion (may be more than one) at a public meeting, but this not a continuance of the public hearing.
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Rehearing Proceedings

- The Board should not hear new argument from anyone, not an opportunity to present the case again.
 - Board may elect not to grant a rehearing, and stand on its earlier decision.
 - Should not be granted easily.
 - An opportunity for the Board to correct any errors brought to its attention.
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We Granted a Rehearing, Now What do we do?

- The case begins again from the beginning, not just on the issues originally identified in the motion(s) for rehearing.
 - All parties must be notified again, who pays for this is often a disputed issue.
 - Require all parties to present all information again, a new record is created.
 - Base the new decision on the new record.
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We Denied a Rehearing, What Happens Now?

- The unhappy party may appeal to Superior Court within 30 days of the decision.
- Be sure to compile and preserve “the record” as completely as possible.
- Requests for information may be made both under the Right to Know Law, and under Superior Court discovery rules. Don’t destroy information before consulting town counsel.

Conclusion

- Making an adjudicative decision is difficult.
 - Regardless of what decision is made, someone will be unhappy with the result.
 - The process is important, the Superior Court will be interested in assuring that the decision was reached fairly.
 - Good procedural rules will result in better decisions, and reduced conflict.
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